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The elusive aim of universal suffrage: Constitutional developments in Hong Kong

Lorenz Langer*

For most of its one hundred and fifty years, British rule over Hong Kong did not allow for any political participation by the local population. Prior to the territory's return to China, however, the United Kingdom and the prospective new sovereign agreed that both the legislature and executive of the future Hong Kong would be determined by elections. China further specified that, as an "ultimate aim," these elections would be based on universal suffrage. Yet in the years since, China has intervened in the supposedly autonomous region to slow down or halt constitutional development. While these interventions contravene the constitutional provisions of the Special Administrative Region, they should not come as a surprise; nor do they represent a change in Chinese attitudes toward Hong Kong. Rather, they reflect the Chinese government's misgivings about free elections—misgivings not unlike those of the British with respect to colonial Hong Kong.

On July 1, 2007, the Hong Kong Special Administrative Region (HKSAR) will celebrate the tenth anniversary of its Constitution, the Basic Law,¹ which sets out "the systems and policies practiced in the HKSAR, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies."² With regard to the selection of the executive and legislative

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¹ ZHONGHUA RENMIN GONGHEGUO XIANGGANG TEBIE XINGZHENGQU JI BEN FA (The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China) [hereinafter *Basic Law*], available at http://www.info.gov.hk/basic_law/fulltext/Basic_Law.pdf (last visited April 3, 2007). The Basic Law was promulgated on April 4, 1990, in its Chinese version, which, in cases of conflict, prevails over the official English version adopted on June 28, 1990, by the Standing Committee of the National People's Congress. On the drafting process, see Ming K. Chan, *Democracy Derailed*, in THE HONG KONG BASIC LAW 1–35 (Ming K. Chan & David J. Clark eds., Hong Kong Univ. Press 1991).

² *Basic Law* art. 11.

systems, however, the Basic Law contains a promise rather than a definitive arrangement: articles 45(2) and 68(2) establish as an “ultimate aim” the election of both the executive and legislature of Hong Kong “by universal suffrage.” Yet in 2004, only one half of the territory’s parliamentary body, the Legislative Council (LegCo), was directly elected by geographical constituencies, while thirty out of sixty seats were filled through “functional constituencies” representing various industries and professions. In March 2007, when the incumbent Donald Tsang was elected to another five-year term as chief executive—the head of the HKSAR and its government³—it was not by universal suffrage but by an Election Committee of 800.

Progress toward the eventual aim of universal suffrage has not made much headway in ten years and has recently come to a complete standstill. In a seemingly paradoxical move, in December 2005, the prodemocracy forces in LegCo, which keep demanding constitutional reform, defeated proposals introduced by the HKSAR government to include elected district councillors in the Election Committee, and to enlarge LegCo.⁴

Why, given the clear constitutional aim, has Hong Kong not progressed further on the road to universal suffrage since its return to China? And why, of all political actors, did democratic parties use LegCo, their only forum, to block any progress on constitutional development, perhaps for years to come? This article aims to set out the constitutional framework of the Special Administrative Region, and to retrace the constitutional debates that have been heating up in Hong Kong since 1997. It will look at three important reasons why constitutional development has stalled—and is likely to remain at an impasse for considerable time to come.

First, the “parents” of the HKSAR had differing, if not opposing, interests at its inception. When the United Kingdom realized that it would not be able to hold onto its colony, it felt obliged to secure some sort of constitutional framework that would guarantee certain rights for Hong Kong and its residents. China, for its part, was determined to reclaim Hong Kong but recognized the need for a peaceful transition lest the territory lose its economic value. Thus, the former metropolitan power was committed to constitutional reform but was not in a position to ensure its implementation. The new metropolitan power regarded any move toward democracy as a British plot to undermine future Chinese rule, yet it also felt obliged to comply to some extent with British demands. As a compromise, a constitutional framework and a blueprint for democratization were agreed on that provided for an implementation of universal suffrage that would be gradual and tortuous and would occur only with Chinese consent. Once the return of a prosperous Hong Kong was secured, China has had little interest in seeing this process completed, or even initiated.

³ *Basic Law* arts. 43(1) and 48(1).

⁴ See *infra* note 204 and accompanying text. “HKSAR government” refers to the chief executive and the executive authorities of the region. Cf. *Basic Law* arts. 59 and 60.

Second, it is further argued that this nonchalance toward constitutional prescriptions reflects the situation in mainland China, where the written Constitution is of little help in determining the political and legal realities of the People's Republic. China has shown signs of applying a similar ideological and political approach to the Basic Law, thus ignoring the document's legal nature and its interpretative provisions by the competent authorities, namely, the courts.

However—the third factor—the People's Republic cannot be blamed exclusively for the lack of progress in Hong Kong's democratization. The Basic Law does offer some means for the authorities of the HKSAR to further constitutional progress. The executive, in particular, holds considerable power, although it is appointed by the Central People's Government (CPG) of China, to which the chief executive would owe exclusive allegiance.⁵ Seeing that China is opposed to universal suffrage in Hong Kong, the HK government has shown no will to advance an agenda that might invoke the displeasure of the CPG. With the Basic Law endowing the Hong Kong legislature and judiciary with restricted powers, it may be argued that the Hong Kong executive bears significant responsibility for attaining universal suffrage—or, by extension, for failing to achieve it.

1. The transition from Crown Colony to Special Administrative Region

1.1. Laying the foundations: Hong Kong's colonial past

As Britain's most significant spoil of the first Opium War,⁶ Hong Kong was established as a colony by Letters Patent in 1843, which also laid down the basic structure of its government.⁷ As the representative of the Queen's sovereignty over Hong Kong, the governor exercised nearly absolute power.⁸ He had full authority to make and enact laws and ordinances, advised by the Legislative Council (LegCo) over which he presided and whose members he appointed.⁹ In addition, he selected the Executive Council (ExCo) "to advise and assist" him in the administration of government. The governor also held the powers of using the Public Seal, of granting land, of appointing judges and civil servants, and of

⁵ On the Central People's Government, see *infra* note 137 and accompanying text.

⁶ Treaty of Nanking, UK-China, art. 3, Aug. 29, 1842, 93 Consol. T.S. 467.

⁷ Letters Patent (The Hong Kong Charter) 1843, *reprinted in* GOVERNMENT AND POLITICS: A DOCUMENTARY HISTORY OF HONG KONG 19 (Steve Tsang ed., Hong Kong Univ. Press 1995). On the Opium wars and the early history of Hong Kong, see IMMANUEL C.Y. HSÜ, *THE RISE OF MODERN CHINA* 168–220 (Oxford Univ. Press 2000) and STEVE TSANG, *A MODERN HISTORY OF HONG KONG* 3–41 (Hong Kong Univ. Press 2004). The Letters Patent were supplemented by the Royal Instructions in 1843 (GOVERNMENT AND POLITICS 22–30). New Letters Patent were issued in 1917, 1985, 1991 and 1993.

⁸ NORMAN MINERS, *THE GOVERNMENT AND POLITICS OF HONG KONG* 69 (Oxford Univ. Press 1998).

⁹ Letters Patent (The Hong Kong Charter) 1843, *in* GOVERNMENT AND POLITICS, *supra* note 7, at 19.

granting pardons. Thus, the administration of Hong Kong was not merely executive-led; originally, it consisted of little more than the executive branch.

Initially, both Legislative and Executive Councils consisted exclusively of ex officio members, who sat on one (or both) councils due to their position in the colonial administration. However, two “unofficial members” were appointed as early as 1850, with the first ethnic Chinese member admitted on a permanent basis in 1884.¹⁰ A second Chinese unofficial member was added later, while suggestions for elected representatives were repeatedly rejected. For the British government, the appointment system allowed for the selection of trustworthy British subjects, while any electoral process might have resulted in an unpredictable outcome.¹¹ Nonetheless, after the Second World War in particular, attempts were made to introduce some form of municipal self-government, which, however, resulted merely in limited direct elections to the Urban Council with little powers.¹² Eventually, an alternative path was pursued to ensure the peace and prosperity of Hong Kong. In response to growing social unrest in the 1960s, the colonial government embarked on a major welfare program with a public housing scheme at its core.¹³

In most other British colonies, some form of political participation was introduced gradually from the 1960s onward, usually as a first step on the path to independence. As required by the United Nations Charter, Britain did, in some cases, “develop self-government” in its colonies, “assist[ing] them in the progressive development of their free political institutions.”¹⁴ Yet no such development took place in Hong Kong, which remained untouched by the decolonization 120 Lorenz movement that was sweeping so much of the world in the decades after World War Two. Britain did fulfill its charter obligations to report to the UN on Hong Kong periodically,¹⁵ but this reporting ceased in 1972, when the People’s Republic requested that the territory be removed from the United Nations’

¹⁰ STEVE TSANG, *DEMOCRACY SHELVED: GREAT BRITAIN, CHINA, AND ATTEMPTS AT CONSTITUTIONAL REFORM IN HONG KONG, 1945–1952* 3 (Oxford Univ. Press 1988).

¹¹ TSANG, *supra* note 7, at 28.

¹² The Urban Council was little more than an advisory board on sanitary matters. See TSANG, *supra* note 10, at 158–160.

¹³ YASH GHAI, *HONG KONG’S NEW CONSTITUTIONAL ORDER* 18 (Hong Kong Univ. Press 1999). In addition, numerous advisory bodies and consultative forums were established. See Christine Loh, *Government and Business Alliance: Hong Kong’s Functional Constituencies*, in *FUNCTIONAL CONSTITUENCIES: A UNIQUE FEATURE OF THE HONG KONG LEGISLATIVE COUNCIL* 30 (Christine Loh et al. eds., Hong Kong Univ. Press 2006).

¹⁴ UN Charter art. 73(b). Directly elected legislatures were introduced in Malaya (present-day Malaysia) and Singapore in the 1950s. See LEO GOODSTADT, *Business-friendly and Politically Convenient: The Historical Role of Functional Constituencies*, in *FUNCTIONAL CONSTITUENCIES*, *supra* note 13, at 41.

¹⁵ UN Charter art. 73(e). Reports were submitted to the Special Committee on Decolonization established by G.A. Res. 1654 (XVI), ¶ 3, U.N. Doc. A/5100 (Nov. 27, 1961).

decolonization agenda.¹⁶ According to General Assembly Resolution 742 (VIII), the validity of any form of association between a non-self-governing territory and a metropolitan or any other country essentially depended on the freely expressed will of the people in the territory concerned.¹⁷ Yet Britain saw no need to consult Hong Kongers over the status quo; nor would China want them to have a say in a possible future scenario in which the territory was recovered. Thus, neither country envisaged the decolonization of Hong Kong, in accordance with the UN's self-determination model, as being in their interests.

1.2. Sino-British negotiations and the Joint Declaration

In the late 1970s, the tranquility of paternalistic colonial rule was disturbed by the prospect of Hong Kong's return to China. While Hong Kong Island and Kowloon had been acquired by Britain "in perpetuity,"¹⁸ the larger part of the colony (the so-called New Territories) had been leased for ninety-nine years in 1898, and the leasehold was set to expire on July 1, 1997.¹⁹ A first attempt by Britain to ascertain Chinese intentions for Hong Kong was made in 1979. It resulted in an unequivocal statement by Deng Xiaoping that China had always been Hong Kong's sovereign and would recover the territory in its entirety.²⁰ Yet in 1982, when Margaret Thatcher visited Beijing, the United Kingdom still hoped to retain control of the territory after 1997, trading sovereignty for administration.²¹ This would have presupposed Chinese recognition of British sovereignty over Hong Kong. In its initial insistence on the validity of the so-called unequal treaties, Britain failed to appreciate how extraordinarily sensitive China was and still is to the issue of sovereignty; Chinese sentiments were—and are—strongly influenced by its descent into semicolonialism in the

¹⁶ UN Department of Public Information, Trust and Non-self-governing Territories, 1945–1999, available at <http://www.un.org/Depts/dpi/decolonization/trust2.htm> (last visited April 4, 2007); PETER WESLEY-SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN HONG KONG 52 (Longman Asia 1994).

¹⁷ G.A. Res. 742 (VIII), ¶ 5, U.N. Doc. A/2630. See also G.A. Res. 1514 (XV), ¶ 5, U.N. Doc. A/4684 (Dec. 14, 1960), and G.A. Res. 1541 (XV), Annex, Principle VII, U.N. Doc. A/4684 (Dec. 15, 1960).

¹⁸ Treaty of Nanking art. 3, *supra* note 6; Convention of Friendship, U.K.-China, Oct. 24, 1860, 123 Consol. T.S. 72–74. However, postimperial Chinese governments never accepted the validity of these "unequal treaties." On the communist doctrine of unequal treaties, see LUCIUS CAFLISH, *Unequal Treaties*, 35 GERMAN INT'L. L.Y.B. 52–80 (1992).

¹⁹ Convention respecting an Extension of Hong Kong Territory, U.K.-China, June 9, 1898, 186 Consol. T.S. 310–311. The convention had entered into force on July 1, 1889. Even though the United Kingdom had not acquired ownership of the New Territories, it nevertheless claimed full sovereignty, arguing that the leasehold constituted a "cession for a term of years." See WESLEY-SMITH, *supra* note 16, at 27.

²⁰ Governor MacLehose met Deng Xiaoping in March 1979. See TSANG, *supra* note 7, at 212–216.

²¹ MARGARET THATCHER, THE DOWNING STREET YEARS 354–355 (HarperCollins 1993).

nineteenth century.²² Deng made it clear that recognizing British sovereignty over Hong Kong—even with respect to the past—was not an option; consequently, China insisted on “recovering” Hong Kong without qualification in 1997.²³

Deng promised that, up to 1997 and beyond, China would have “an extensive exchange of views with Hong Kong people from all walks of life.”²⁴ “Hong Kongers ruling Hong Kong” was announced as one of China’s guiding principles in early 1982.²⁵ Nonetheless, when Sino-British negotiations began in the autumn of 1982, the Chinese insisted that they be strictly bilateral; attempts by Britain to include representatives of Hong Kong in an independent capacity were categorically rejected. When the British side tried to involve Governor Edward Youde, arguing that Hong Kong was a “stool with three legs,” Deng Xiaoping maintained that there were only two legs on the stool. Any member of the British delegation not carrying a British passport was not permitted to enter the country.²⁶ When Chinese members of ExCo dared to express their critical views, Deng reprimanded them, stating that they did not represent Hong Kong society and that the Chinese leadership knew what was best for the territory.²⁷

Yet it would be wrong to attribute the exclusion of the people of Hong Kong solely to China. In 1979, ExCo members were kept in the dark as to Britain’s first contacts with the Chinese over Hong Kong’s future.²⁸ And only after agreement on basic principles had been reached with China did the British foreign secretary Geoffrey Howe disclose the results of the talks to the Hong Kong LegCo.²⁹ No procedure or framework was set up that would have allowed the inhabitants of Hong Kong to make their views known. When in May 1984, unofficial members of LegCo and ExCo traveled to London to offer the views of the Hong Kong population (or at least of a part of it) to members of

²² These sentiments are illustrated by the extensive preamble to the Constitution of the People’s Republic, which stresses that “China is a country with one of the longest histories in the world,” and which recounts its people’s “heroic struggle” against feudalism and colonialism. ZHONGHUA RENMIN GONGHEGUO XIAN FA pmbl. paras. 1–2, available at <http://www.npc.gov.cn/zgrdw/english/constitution/constToDetail.jsp?id=full&pages=0> (last visited April 6, 2007).

²³ Deng Xiaoping, *Our Basic Position on the Question of Hong Kong* (Sept. 24, 1984), reprinted in DENG XIAOPING ON “ONE COUNTRY, TWO SYSTEMS” 1 (Joint Publishing 2004).

²⁴ *Id.*, at 3.

²⁵ JOHN FLOWERDEW, *THE FINAL YEARS OF BRITISH HONG KONG* 31 (Macmillan 1998).

²⁶ GHAI, *supra* note 13, at 42; BOB BEATTY, *DEMOCRACY, ASIAN VALUES, AND HONG KONG* 14 (Praeger Publishers 2003).

²⁷ TSANG, *supra* note 7, at 218.

²⁸ GOODSTADT, *supra* note 14, at 49.

²⁹ The Hong Kong Government had not even been informed about the secretary’s visit to Beijing. See FLOWERDEW, *supra* note 25, at 40.

Parliament,³⁰ the meeting took place in “very unsympathetic atmosphere.”³¹ Once again, they were told that they “did not represent the views of the people of Hong Kong.”³² Nor were any concessions made with regard to a possible right of abode in Britain for Hong Kong citizens should the territory be returned to China.³³ They could apply for “British National (Overseas)” status,³⁴ which, however, did not confer the right of abode. Despite the “moral obligation” toward Hong Kong stressed by many politicians,³⁵ Britain did not wish to take over any legal obligation.

After protracted negotiations, the United Kingdom and China agreed in a Joint Declaration that the latter would “resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997.”³⁶ The declaration was based on the principle of “one country, two systems,” whereby the mainland would maintain its socialist system and Hong Kong its capitalist system.³⁷ It is important to remember that this principle was originally devised for the reunification of Taiwan and China.³⁸ At the time, Taiwan was as much a one-party state as the People’s Republic; thus, the “two systems” did not have a political connotation but referred to the coexistence of two different economic systems within one country.³⁹

³⁰ CHUNG SZE-YUEN, *What has Gone Wrong During the Transition? in HONG KONG’S TRANSITION 4* (Wang Gungwu & Wong Siu-lun eds., Oxford Univ. Press 1995); FLOWERDEW, *supra* note 25, at 44.

³¹ CHUNG, *supra* note 30, at 4.

³² By former prime minister Edward Heath (quoted by FLOWERDEW, *supra* note 25, at 44). The foreign secretary Geoffrey Howe pointed out to the delegation that, not being elected by the people, they could not speak for the people. See CHUNG SZE-YUE, *HONG KONG’S JOURNEY TO REUNIFICATION* 87–88 (Chinese Univ. Press 2001). This view somewhat neglected British responsibility for the absence of an electoral element to Hong Kong’s government.

³³ The 1962 and 1968 Immigration Acts had limited the right of abode in the United Kingdom for colonial subjects if their parents or grandparents had not been born in the United Kingdom. With the 1981 British Nationality Act, a new category of British Dependent Territories Citizenship was introduced for colonial subjects; this category, to which over three million Hong Kongers belonged, did not entail the right of abode. See ANTHONY BRADLEY & KEITH EWING, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 427–435 (Pearson Longman 2003).

³⁴ Hong Kong Act, 1985, c. 15, § 2(2), sched. 2(1)(b) (U.K.).

³⁵ TSANG, *supra* note 7, at 214.

³⁶ Joint Declaration on the Question of Hong Kong art. 1, China-U.K., Dec. 19, 1984, 1399 U.N.T.S. 61.

³⁷ Deng Xiaoping, *One Country, Two Systems* (June 22–23, 1984), reprinted in DENG, *supra* note 23, at 13–18.

³⁸ Peng Zhen, *Report on the Draft of the Revised Constitution of the PRC, Delivered at the 5th Session of the 5th NPC on November 26, 1982*, in FIFTH SESSION OF THE FIFTH NATIONAL PEOPLE’S CONGRESS 99–101 (Foreign Language Press Beijing 1983).

³⁹ DENG, *supra* note 37, at 14.

“Taking account of the history of Hong Kong and its realities,” the People’s Republic would thus, in accordance with article 31 of the Chinese Constitution,⁴⁰ establish a Hong Kong Special Administrative Region that would enjoy “a high degree of autonomy, except in foreign and defense affairs which are the responsibilities of the Central People’s Government.”⁴¹ With regard to the region’s constitutional structure, the declaration provided for a chief executive to be appointed by the CPG, based on “elections or consultations to be held locally.”⁴² The executive authorities would be accountable to the legislature,⁴³ which was to be “constituted by elections.”⁴⁴ The laws previously in force in Hong Kong (that is, the common law, rules of equity, ordinances, subordinate legislation, and customary law) would be maintained;⁴⁵ the power of final judgment, which had previously rested with the Judicial Committee of the Privy Council,⁴⁶ would be transferred to a court of final appeal in the HKSAR.⁴⁷ China promised to enshrine the provisions of the declaration in the Basic Law to be promulgated by the National People’s Congress (NPC) and which would remain unchanged for fifty years.⁴⁸ During the years leading up to 1997, China and the United Kingdom agreed to cooperate in maintaining Hong Kong’s social stability and economic prosperity;⁴⁹ to this end, they would establish a Joint Liaison Group.⁵⁰

The concept of “one country, two systems” was seen, at least by the Chinese side, as a panacea for any difficulty the return of Hong Kong might entail. Deng Xiaoping even promoted it as “a new approach to stabilizing the world situation.”⁵¹ Yet this enthusiasm glossed over the intricacies of such an innovative approach. While the combination of different legal systems in one state was

⁴⁰ This provision had been added to the Constitution with a view to Hong Kong in December 1982. See TSANG, *supra* note 7, at 221.

⁴¹ Joint Declaration, *supra* note 36, art. 3(2).

⁴² *Id.*, art. 3(4).

⁴³ *Id.*, Annex I art. 1(3).

⁴⁴ *Id.*, Annex I art. 1(3).

⁴⁵ *Id.*, Annex I art. 2(1).

⁴⁶ WESLEY-SMITH, *supra* note 16 at 138.

⁴⁷ Joint Declaration, *supra* note 36, Annex I art. 3(4).

⁴⁸ *Id.*, art. 3(12).

⁴⁹ *Id.*, art. 4.

⁵⁰ *Id.*, art. 5 and Annex II.

⁵¹ Deng Xiaoping, *A new approach to stabilizing the World Situation* (February 22, 1984), reprinted in DENG, *supra* note 23, at 11–12.

not new,⁵² there was no precedent for two different economic systems operating within a single sovereign state.⁵³ The Chinese economy may have begun to adopt capitalist characteristics, yet it has remained centrally governed and planned. Further, by focusing on economics, the concept of “one country, two systems” might underestimate the extent to which a free economy presupposes freedom in other areas or might encourage demands for such freedom.

The agreement on Hong Kong’s future was peculiar in another sense. The autonomy of a subnational entity is usually the result of a progressive development, entailing an open-ended process. At the beginning of the process, it is not clear whether, or to what extent, autonomy eventually will be granted or achieved.⁵⁴ China, on the other hand, promised Hong Kong a high degree of autonomy from the outset but provided only sketchy details of the implementation of this promise. Many aspects of the territory’s autonomy, such as the constitutional setup, would only be implemented after the handover. In addition, autonomy was guaranteed for a limited period of time only and would become discretionary after fifty years.

1.3. The transitional period

These contradictions first became apparent in the work of the Joint Liaison Group. The “co-operative relationship” and “friendly spirit”⁵⁵ with which this group was intended to operate did not prevail for long. The Chinese were suspicious that Britain, as an imperial power, was intent on draining Hong Kong of its wealth before handing it back.⁵⁶ They were particularly wary of British attempts to allow Hong Kong’s citizens a greater say in politics. The Chinese side maintained that Britain should wait for China to draft the Basic Law and

⁵² The Roman concept of *ius gentium* provided for the application of Roman law to Roman citizens and of a modified version to foreigners or *peregrini* within the Roman empire. MAX KASER, *IUS GENTIUM* 4–6 (Forschungen zum Römischen Recht 40, Böhlau 1993). This distinction continued to form the basis of the early medieval *leges barbarorum*. Today, different legal systems within one state are usually linked to federal divisions, such as the civil law systems in Louisiana or in Québec, Sharia law in twelve of Nigeria’s thirty-seven states, or tribal law in the Federally Administered Tribal Areas of Pakistan. In the Macau SAR, Portuguese law continues to be applied in much the same way as the common law in Hong Kong. See LEI BÁSICA DA REGIÃO ADMINISTRATIVA ESPECIAL DE MACAU (Basic Law of the Special Administrative Region of Macau) art. 8.

⁵³ In Macau, the Basic Law of which is largely identical to Hong Kong’s, the capitalist system is also protected for fifty years. LEI BÁSICA art. 5.

⁵⁴ Some recent examples include devolution in the United Kingdom and additional powers for Spain’s Autonomous Communities. Uncertainty also persists with regard to Kosovo, where a form of supervised independence has been suggested. See *On the Road to Independence*, THE ECONOMIST, Feb. 3, 2007, at 11.

⁵⁵ Joint Declaration, *supra* note 36, Annex II art. 1.

⁵⁶ Deng Xiaoping, *We shall be paying close attention to developments in Hong Kong during the Transition period* (July 31, 1984), reprinted in DENG, *supra* note 23, at 19–22.

then make sure that British administration up to 1997 would match or synchronize with the provisions of this law. This approach became known as “convergence,” and the United Kingdom eventually agreed to it in 1986.⁵⁷

Still, 1985 had seen, for the first time, twenty-four out of fifty-seven legislative councillors returned by election rather than gubernatorial appointment. However, no direct electoral system was introduced: twelve members were selected by an electoral college and another twelve by “functional constituencies,” that is, business groups and professional organizations.⁵⁸ Since the early days of the colony, similar schemes had been used to enable certain groups and institutions—such as justices of the peace and the Hong Kong General Chamber of Commerce—to nominate an unofficial LegCo member.⁵⁹ However, suggestions by the Colonial Office in London to expand and institutionalize such constituencies were rejected by subsequent governors, who argued that even indirect elections might jeopardize the stability of the colony by granting too much participation to its (Chinese) inhabitants.⁶⁰ The prospect of the territory’s return to China, however, made some degree of political reform unavoidable. If the Joint Declaration were to be accepted by Parliament (and the British public), it would have to offer a semblance of democracy for Hong Kongers.⁶¹ Thus, the idea of functional constituencies, previously spurned, made its comeback. By 1985, however, this concept provided an inadequate and anachronistic approach to public participation, recalling the guild system in the towns of late medieval Europe. Presumably, it served the same purpose—to keep political control firmly within the business and merchant classes.

The functional constituencies are a unique feature of the Hong Kong constitutional system, similar, at least in principle, to the university constituencies in the British House of Commons, through which certain universities provided a number of MPs.⁶² Today, the Lords Spiritual and, when not concerned with legal matters, the Law Lords in the House of Lords, might be considered

⁵⁷ TSANG, *supra* note 7, at 233–236.

⁵⁸ MINERS, *supra* note 8, at 26. The origins of functional constituencies date back to 1884. See TSANG, *supra* note 10, at 3).

⁵⁹ GOODSTADT, *supra* note 14, at 43.

⁶⁰ Alexander Grantham, governor from 1947–1957, objected on the grounds that the constituencies necessitated by such a scheme would enfranchise “enthusiastic but inexperienced bodies who have little knowledge of wider policy and whose true value to the community has still to be measured.” GOODSTADT, *supra* note 14, at 50. Doubts about the loyalty of Britain’s Chinese subjects also lingered.

⁶¹ TSANG, *supra* note 7, at 231.

⁶² The universities’ representatives were selected by their respective graduates. The constituencies were abolished in 1948, prior to the 1950 elections. See F.W.S. CRAIG, *BOUNDARIES OF PARLIAMENTARY CONSTITUENCIES* 46 (Political Research Publications 1972).

functional constituencies of a sort.⁶³ A similar arrangement is found in the upper house of the Irish parliament, the Seanad Éireann.⁶⁴

The introduction of functional constituencies in Hong Kong scarcely represented a dramatic rush to participatory government. Out of a population of 5,456,200, only 46,645 electors (including corporations) could vote in the 1985 functional constituencies elections.⁶⁵ Nonetheless, even this cautious approach provoked the Chinese side to insist that this change in the composition of LegCo constituted a breach of the Joint Declaration, even though a change along these lines was mandated by the Declaration, which provided for the election of LegCo by 1997 at the latest. Under Chinese pressure, Britain eventually agreed not to introduce any major changes until the Basic Law was promulgated in 1990.⁶⁶

1.3.1. *The drafting of the Basic Law*

The Joint Declaration had provided only general guidelines for the constitutional makeup of the HKSAR and for its relationship with the CPG, leaving it to the Basic Law to set forth more detailed provisions. This Basic Law would implement the Joint Declaration and, at the same time, prescribe the “system to be instituted” in the HKSAR.⁶⁷ Its drafting began in June 1985 with the establishment of the Basic Law Drafting Committee (BLDC), appointed by the National People’s Congress Standing Committee (NPCSC) and operating under

⁶³ In judicial matters, the Law Lords constitute the United Kingdom’s final court of appeal. The Lords Spiritual consist of twenty-six bishops of the Church of England. See BRADLEY & EWING, *supra* note 33, at 174.

⁶⁴ Forty-nine of sixty members of the Seanad are selected by vocational panels akin to functional constituencies, and six members are dispatched by university constituencies. The remaining eleven members are nominated by the Taoiseach (prime minister). IR. CONST. art. 18. The powers of the Seanad, however, are limited, and it cannot block legislation passed by the lower house, the Dáil Éireann. IR. CONST. art. 23(1). The vocational panel system seems set to be reformed, with the panels abolished and directly elected members introduced. Johannes Chan, *Recent Political Reform in the Republic of Ireland*, in HONG KONG’S CONSTITUTIONAL DEBATES 62 (Johannes Chan & Lison Harris eds., Hong Kong L.J. Ltd. 2005).

⁶⁵ HKSAR GOVERNMENT CENSUS AND STATISTICS DEPARTMENT, DEMOGRAPHIC TRENDS IN HONG KONG 1981–2001 8 (HKSAR Government Printing Department 2002); FUNCTIONAL CONSTITUENCIES, *supra* note 13, Appendix 5.

⁶⁶ TSANG, *supra* note 7, at 232–233. It also abandoned plans to introduce further reforms in 1988. In 1987 a survey had been conducted on constitutional change, based on a Green Paper strongly discouraging support for direct elections. Still, a majority of respondents favored the introduction of direct elections to LegCo, and the Survey Office had to tweak the results of the public consultations to obtain the desired outcome for its 1988 White Paper. See MINERS, *supra* note 8, at 26–27).

⁶⁷ XIAN FA art. 31 (P.R.C.).

the guidance of the State Council's Hong Kong and Macau Affairs Office.⁶⁸ A group of senior members of the Communist Party of China, including Deng Xiaoping, provided overall direction. Deng also reminded the members of the BLDC that the Basic Law would have to allow for intervention by the CPG, as there might be "things [Hong Kong] will find hard to settle without the help of the Central Government," and as Britain would not be there any longer to help.⁶⁹ It "simply wouldn't work" if "Hong Kong's affairs were administered solely by Hong Kong people while the Central Government had nothing to do with the matter."⁷⁰ Also, there could be forces in Hong Kong "that might engage in obstruction or sabotage," and China would not allow them "to convert Hong Kong into a base of opposition to the mainland under the pretext of 'democracy.'" In such a situation, China "would have no choice but to intervene."⁷¹

With regard to the constitutional system, Deng explained that it would not be appropriate to create a replica of Western systems with the separation of three powers or a parliamentary system; nor would it be "appropriate for people to judge whether Hong Kong's system is democratic on the basis of whether it has those features."⁷² Deng also stated that he did not think it would "be good for Hong Kong" to hold general elections. Hong Kong's administrators should be "people from Hong Kong who love the motherland and Hong Kong," but a general election would not "necessarily bring out people like that."⁷³ If ever general elections were held, it would have to be after a transition period and through a gradual process.⁷⁴ And it would always be on the premise that "patriots form the main body of ... the future government of the Hong Kong special region."⁷⁵

⁶⁸ Of the BLDC's fifty-nine members, thirty-six were from mainland China and twenty-three from Hong Kong. The Hong Kong members had been appointed by the New China News Agency (Xinhua) in Hong Kong. The BLDC was complemented by a Basic Law Consultative Committee (BLCC) of 180 appointed Hong Kongers. For a detailed account, see GHAI, *supra* note 13, at 56, and Chan, *supra* note 1, at 5–8.

⁶⁹ Deng Xiaoping, Speech at a Meeting with the Members of the Committee for the Drafting of the Basic Law of the HKSAR (April 16, 1987), reprinted in DENG, *supra* note 23, at 77.

⁷⁰ *Id.*, at 76. This somewhat contradicts Deng's earlier statement that China "should have faith in the Chinese of Hong Kong, who are quite capable of administering their own affairs." Deng, *supra* note 37, at 16.

⁷¹ Deng, *supra* note 69, at 77.

⁷² *Id.*, at 75.

⁷³ *Id.*, at 75–76.

⁷⁴ *Id.*, at 76.

⁷⁵ Deng, *supra* note 37, at 17. According to Deng, "a patriot is one who respects the Chinese nation, sincerely supports the motherland's resumption of sovereignty over Hong Kong and wishes not to impair Hong Kong's prosperity and stability."

A first draft of the Basic Law was published in April 1988,⁷⁶ a second one in February 1989.⁷⁷ In accordance with article 31 of the Chinese Constitution, the final version was promulgated by the NPC on April 4, 1990. It entered into force with the establishment of the HKSAR on July 1, 1997.

1.3.2. *Constitutional reforms after 1989*

By the time the Basic Law was promulgated in 1990, the political climate in Hong Kong had already changed dramatically with the suppression of the student movement in Tiananmen Square in June 1989. Hong Kongers had shown their support for the Chinese students by several demonstrations, some of them numbering over one million participants⁷⁸—or about 15 percent of the entire population. Suddenly, the Joint Declaration seemed a frail protection against the tanks of the People's Army. The British government came under strong pressure to accelerate the process of democratization in Hong Kong,⁷⁹ and to reconsider its stance on immigration policy.⁸⁰ There was a general, if belated, sense of guilt on the British side, both with regard to “the painful history of nationality legislation,” and the “failure to introduce democracy to Hong Kong well before the negotiations.”⁸¹ Nonetheless, the British government of the day insisted that granting the right of abode to 3.25 million holders of British Dependent Territories passports was not an option.⁸² Instead, the “overriding aim” of the government was to encourage “people whose service [was] of value to Hong Kong to remain there.”⁸³ In addition, the British government announced the introduction of a bill of rights for Hong Kong in July 1989,⁸⁴

⁷⁶ The Draft Basic Law of the HKSAR of the PRC (for Solicitation of Opinions), *reprinted in THE HONG KONG BASIC LAW*, *supra* note 1, at 63–91.

⁷⁷ The Basic Law of the HKSAR of the PRC (Draft), *reprinted in THE HONG KONG BASIC LAW*, *supra* note 1, at 145–161.

⁷⁸ FLOWERDEW, *supra* note 25, at 66.

⁷⁹ THATCHER, *supra* note 21, at 495. Unofficial Members of LegCo and ExCo started lobbying the British government and Parliament. CHUNG, *supra* note 30, at 11.

⁸⁰ Paddy Ashdown MP (Liberal Democrats), House of Commons Debate on China and Hong Kong, July 13, 1989, *reprinted in THE HONG KONG BASIC LAW*, *supra* note 1, at 253.

⁸¹ PERCY CRADOCK, *EXPERIENCES OF CHINA* 248–249 (John Murray 1994). Sir Percy Cradock had been British ambassador to Beijing, and foreign policy adviser to both Mrs. Thatcher and Mr. Major. He led the British delegation during Sino-British negotiations in Beijing.

⁸² Sir Geoffrey Howe MP, Statement by the British Foreign Secretary in the House of Commons, July 5, 1989, *reprinted in THE HONG KONG BASIC LAW*, *supra* note 1, at 246–247.

⁸³ Sir Geoffrey Howe MP, House of Commons Debate on China and Hong Kong, July 13, 1989, *reprinted in THE HONG KONG BASIC LAW*, *supra* note 1, at 250. To this end, key groups were eligible for full citizenship under the British Nationality (Hong Kong) Act 1990, c. 34 (U.K.). It was hoped that this safety net might persuade them to stay on.

⁸⁴ Hong Kong Bill of Rights Ordinance, (1991) Cap. 363, No. 59 of 1991.

which would incorporate most of the provisions of the International Covenant on Civil and Political Rights (ICCPR), as they applied to Hong Kong, into the laws of the colony.⁸⁵ The qualification is significant as Britain had made several reservations on the application of the ICCPR to Hong Kong, most notably with regard to the establishment of an elected legislature.⁸⁶

In response to the demands for extending public participation,⁸⁷ eighteen directly elected LegCo seats were introduced in 1991, with a further twenty-one selected by the functional constituencies. With this relatively low number, Britain could secure Chinese acquiescence and the prospect of the 1995 LegCo's tenure spanning the handover (the so-called "through train").⁸⁸ Furthermore, in early 1990 China agreed to the direct election of twenty LegCo members in 1997, twenty-four in 1999, and thirty in 2003.⁸⁹ Governor Patten, whose appointment in 1992 was also meant to underline Britain's commitment,⁹⁰ raised the number of directly elected members to twenty for the 1995 LegCo elections, with thirty members elected by functional constituencies and ten by an Election Committee. Patten considered the functional constituencies an "abomination," similar to the "worst abuses of British eighteenth-century parliamentary history."⁹¹

⁸⁵ HONG KONG GOVERNMENT, AN INTRODUCTION TO THE BILL OF RIGHTS 3 (Printing Department 1991). Not all provisions were incorporated, with the right to self-determination (provided for by ICCPR art. 1) the most notable absence.

⁸⁶ The United Kingdom reserved the right not to apply ICCPR art. 25(b) insofar as it may require the establishment of an elected legislature in Hong Kong. See 1007 U.N.T.S. 394. The Bill of Rights stated explicitly that the right to vote and to be elected in periodic universal elections did "not require the establishment of an elected Executive or Legislative Council" (Bill of Rights Ordinance, (1991) III, 13). The ordinance was not adopted in its entirety into the law of the HKSAR under *Basic Law* art. 160; most importantly, the provisions requiring interpretation in accordance with the ICCPR were not adopted by the NPCSC.

⁸⁷ THATCHER, *supra* note 21, at 495.

⁸⁸ Message of U.K. Foreign Secretary Douglas Hurd MP to Chinese Foreign Minister Qian Qichen (Feb. 12, 1990), reprinted in GOVERNMENT AND POLITICS, *supra* note 7, at 97. This arrangement was referred to as the "through train." See *Decision of the National People's Congress on the Method of the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region*, April 4, 1990, para. 6, available at http://www.info.gov.hk/basic_law/fulltext/index.htm.

⁸⁹ GOVERNMENT AND POLITICS, *supra* note 7, at 97; TSANG, *supra* note 7, at 250.

⁹⁰ Contrary to most previous governors, who were senior civil servants, Patten was a politician. As chairman of the Conservative Party, he ran a successful Tory campaign for John Major in 1992 and was, therefore, close to the prime minister. See CHRIS PATTEN, EAST AND WEST 13–15 (Macmillan 1998).

⁹¹ *Id.*, at 58. On the uneven distribution of House of Commons constituencies before 1832, see BRADLEY & EWING, *supra* note 33, at 151.

In 1991, the functional constituencies comprised 69,825 eligible voters or slightly more than 1 percent of the population.⁹² However, as indirect elections were part of the electoral agreements with China, the functional constituencies could not be abolished; instead, Patten increased their number to thirty and enlarged the electorate so that each individual who worked in a profession or business sector was entitled to vote in his or her respective constituency. He also abolished corporate voting.⁹³ With 1,150,000 individuals entitled to vote for a functional constituency,⁹⁴ the governor significantly reduced the inequalities linked to the indirect electoral system. To an outraged China, however, these arrangements violated the “spirit” of both the Joint Declaration and the Basic Law;⁹⁵ it was decided that after the handover, the 1995 LegCo would be replaced by an appointed Provisional LegCo—the through train had broken down.⁹⁶

With hindsight, this outcome should not have been surprising. China had made it clear from the very outset that it would not condone any fundamental changes to the status quo before the handover. Nor would it accept that its future Hong Kong subjects would have a say in their own future. Even though China had denounced British imperialist rule and stressed the ability of Hong Kongers to look after themselves, it was not willing to acquiesce in any last-minute attempts by Britain to introduce democratic elements into Hong Kong’s government. Despite Governor Patten’s commitment, such attempts did lack conviction, seeing that they began a century and a half after colonial rule, and only once the return of the territory to China had become inevitable. And even at this stage, the British government still seemed more concerned about a possible influx of refugees than with the future fate of its erstwhile Hong Kong subjects.

The transitional period shows clearly that Chinese opposition to the introduction of democratic elements in Hong Kong is not a new attitude but has

⁹² This number still includes corporate votes. FUNCTIONAL CONSTITUENCIES, *supra* note 13, Appendix 5. In 1991, Hong Kong’s population had risen to 5,752,000. HKSAR GOVERNMENT, *supra* note 65, at 8.

⁹³ Furthermore, Patten stopped appointments to the district boards (later district councils), which were, as a consequence, selected through elections only. For an account of Patten’s reforms, see TSANG, *supra* note 7, at 256.

⁹⁴ FUNCTIONAL CONSTITUENCIES, *supra* note 13, Appendix 5; in 1995, the entire population of Hong Kong amounted to 6,156,100. HKSAR GOVERNMENT, *supra* note 65, at 8.

⁹⁵ The Basic Law, however, was in no way binding on the British side; in addition, the CPG failed to elucidate which provisions of the declaration had been breached. PATTEN, *supra* note 90, at 65–69.

⁹⁶ On the “through train” see note 88, *supra*; on the selection of the Provisional LegCo, see JAMES TANG, *The Special Administrative Region Government and the Changing Political Order in Hong Kong*, in MINERS, *supra* note 8, at 249–254. For a comprehensive overview of constitutional development up to 1997, see Benny Tai Yiu-ting, *The Development of Constitutionalism in Hong Kong*, in THE NEW LEGAL ORDER IN HONG KONG 39–69 (Raymond Wacks ed., Hong Kong Univ. Press 1999).

been a consistent policy for almost three decades. It also illustrates that the new sovereign has the same qualms about elections the United Kingdom itself had over so many years—the essential dilemma being, simply, that outcomes are decided by the voters rather than the rulers.

2. Constitutional reform in the HKSAR: *Dramatis personae*

2.1. Actors in the HKSAR

2.1.1. *The Hong Kong executive*

According to the Basic Law, the HKSAR is headed by a chief executive with extensive powers.⁹⁷ Some of these are powers commonly vested in the executive branch, such as heading the administration,⁹⁸ implementing laws,⁹⁹ issuing executive orders,¹⁰⁰ nominating principal officials,¹⁰¹ and conducting external affairs.¹⁰² Yet the chief executive also has to approve the introduction of bills regarding expenditure and revenues.¹⁰³ He signs bills and budgets passed by LegCo, and he promulgates laws.¹⁰⁴ In addition, he appoints and removes judges at all levels.¹⁰⁵ Thus, the term “executive-led” is an apt description of the constitutional system. In fact, the Basic Law’s provisions concerning the chief executive are reminiscent of the powers allocated to the governor by the Letters Patent.¹⁰⁶ The balance between legislature and executive is heavily tilted in favor of the latter. In the event of conflict, the chief executive can dissolve LegCo—with the restriction that he may do so only once in each term of his office.¹⁰⁷ LegCo, on the other hand, can only instigate impeachment procedures but has no control over their outcome.¹⁰⁸

The chief executive is formally appointed by the CPG—as was the governor by the British government—for a term of five years, after being selected by

⁹⁷ *Basic Law* ch. IV § 1.

⁹⁸ *Id.*, art. 48(1) and 60.

⁹⁹ *Id.*, 48(2).

¹⁰⁰ *Id.*, 48(4).

¹⁰¹ *Id.*, 48(5).

¹⁰² *Id.*, 48(9). On the distinction between foreign and external affairs in the Chinese version, see GHAI, *supra* note 13, at 461.

¹⁰³ *Basic Law* art. 48(10).

¹⁰⁴ *Basic Law* art. 48(3).

¹⁰⁵ *Basic Law* art. 48(6).

¹⁰⁶ See *supra* notes 7–9 and accompanying text.

¹⁰⁷ *Basic Law* art. 49 and 50. Only if a newly elected LegCo continues to oppose the chief executive will he have to resign. *Basic Law* arts. 52(2) and (3).

¹⁰⁸ See *infra* note 121 and accompanying text.

election or through consultations held locally.¹⁰⁹ Article 45(2) of the Basic Law states that the method for selecting the chief executive shall be specified “in the light of the actual situation” in the territory and “in accordance with the principle of gradual and orderly progress.” The eventual aim is the “selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.”¹¹⁰ Annex I specifies that “if there is a need to amend the method for selecting the Chief Executives for the terms subsequent to the year 2007,” such amendments would have to be endorsed by two-thirds of LegCo and by the chief executive, and be reported to the NPCSC for approval.¹¹¹

Tung Chee-hwa, a shipping magnate, had been appointed the first chief executive in 1997 by the CPG.¹¹² Despite a generally uninspiring performance, he was granted a second term in 2002. In 2003, however, his botched handling of security legislation led to large-scale protests¹¹³ and convinced Beijing to look for alternatives. In March 2005, the CPG appointed Tung to an advisory post reserved for retired functionaries,¹¹⁴ and he duly resigned his office within days—citing health reasons, the only justification offered by the Basic Law for such a unilateral step.¹¹⁵ The sole candidate for his succession was Donald Tsang Yam-kuen, previously chief secretary for administration of the HKSAR, who was appointed chief executive by the CPG on June 21, 2005.¹¹⁶

¹⁰⁹ *Basic Law* arts. 43, 46 and 45(1).

¹¹⁰ The initial composition of this nominating body—the Election Committee—is set out in *Basic Law* Annex I art. 2.

¹¹¹ *Basic Law* Annex I art. 7.

¹¹² Previously, he had served as an unofficial member of Chris Patten’s Executive Council. Under his father, the family business had been bailed out by the P.R.C. See *The New Merchant Prince*, *THE ECONOMIST*, July 5, 1997, at 68.

¹¹³ Under *Basic Law* art. 23, the HKSAR government is required to enact laws “to prohibit any act of treason, secession, sedition, subversion against the Central People’s Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.” After large demonstrations with more than half a million participants, the government delayed implementation of its proposals. See *Hong Kong rebels—Rebellion; Hong Kong and China*, *THE ECONOMIST*, July 12, 2003, at 10. For detailed discussion, see NATIONAL SECURITY AND FUNDAMENTAL FREEDOMS: HONG KONG’S ARTICLE 23 UNDER SCRUTINY (Fu Hualing, Carole J. Petersen & Simon Young eds., Hong Kong Univ. Press 2005).

¹¹⁴ *Time runs out for China’s loyal servant*, *THE ECONOMIST*, March 5, 2005, at 63.

¹¹⁵ *Basic Law* art. 52(1).

¹¹⁶ *CE to Take Oath in Beijing*, HKSAR Government press release, June 21, 2005, available at <http://www.info.gov.hk/gia/general/200506/21/06210158.htm>. On the issue of the length of his term, see *infra* note 175 and accompanying text. Donald Tsang had served as Financial Secretary of Chris Patten from 1995–1997; in 1997, he received a knighthood (KBE). See *A Knight of the People’s Paradise*, *THE ECONOMIST*, June 16, 2005, at 60.

2.1.2. LegCo

Compared to the executive, the LegCo's powers are restricted: its sixty members may introduce bills relating to government policies only with the written consent of the chief executive.¹¹⁷ Apart from approving budgets, taxation, and public expenditures,¹¹⁸ its role is limited to debating and raising questions about acts of the government.¹¹⁹ Furthermore, any amendment to the Basic Law requires approval by two-thirds of its members.¹²⁰ And while the chief executive may dissolve LegCo, the latter does not have the power to act on impeachment. It may initiate investigations into perceived misdeeds of the chief executive and, consequently, pass a motion of impeachment. Yet the final decision is left to the CPG.¹²¹

Annex II to the Basic Law provides rules for the election of the first three legislatures after the handover.¹²² In accordance with these rules, the provisional LegCo of 1997 was replaced in 1998 with thirty members selected by functional constituencies, ten by the Election Committee, and twenty by geographical constituencies through direct elections.¹²³ In 2000, six members were selected by the committee and the number of directly elected members increased to 24.¹²⁴ In 2004, thirty members were elected directly and thirty by functional constituencies.¹²⁵ The 2004 elections were preceded by a Chinese campaign starting with the republication by the New China News Agency (Xinhua) of the

¹¹⁷ *Basic Law* art. 74.

¹¹⁸ *Basic Law* arts. 73(2) and (3).

¹¹⁹ *Basic Law* arts. 73(3)–(9).

¹²⁰ *Basic Law* art. 159(2). For a detailed discussion of LegCo, see GHAI, *supra* note 13, at 259–262.

¹²¹ *Basic Law* art. 73(9).

¹²² The Basic Law did not provide for a Provisional LegCo (*cf. supra* note 96), the legality of which was consequently challenged in the Court of Final Appeal (HKSAR v. Ma Wai Kwan David [1997] H.K.L.R.D 761). The Court held that the 1998 LegCo was the “First LegCo” referred to by the Basic Law, while the Provisional LegCo had been an “interim measure” necessitated by the derailment of the through train. *See supra* note 88 and accompanying text.

¹²³ *Basic Law* Annex II art. I. The Election Committee was identical to the one selecting the Chief Executive. The number of eligible voters in the functional constituencies had been reduced to 127,075 after the handover, and corporate voting was reintroduced. *Cf. supra* notes 91–94. Also, the Provisional LegCo had changed the voting system, favoring pro-China forces. *See GHAI, supra* note 13, at 260, note 16. A member of the Committee who was also enfranchised in a functional constituency thus held three votes: one in the Committee, and one each in a functional and a geographical constituency.

¹²⁴ *Basic Law* Annex II art. I(1). For the results of the elections in the geographical constituencies, see <http://www.elections.gov.hk/elections/legco2004/eindex.html> (last visited April 6, 2007).

¹²⁵ *Basic Law* Annex II art. I(1). For the results of the elections in the geographical constituencies, see <http://www.elections.gov.hk/elections/legco2004/eindex.html> (last visited April 6, 2007). For discussion, see Ma Ngok, *Pluralization Amidst Polarization: The 2004 LegCo Election*, in HONG KONG'S CONSTITUTIONAL DEBATES, *supra* note 64, at 135–142.

late Deng Xiaoping's remarks on the concept of "one country, two systems."¹²⁶ As the People's Daily (the CPG's organ) stressed, this republication was "by no means coincidental" but was intended to "point out certain confusions and misconceptions in the recent debate on constitutional development in the SAR and clarify them at the level of principle."¹²⁷ Reference was mainly made to Deng's statement on patriots governing Hong Kong, and to his rejection of universal suffrage.¹²⁸ The accusation of Hong Kong democrats being "unpatriotic" was soon added to the barrage.¹²⁹ Other traditional means to ferment patriotic feelings, such as military parades, visits by athletes, greetings from astronauts, and incriminations against democratic candidates were also used.¹³⁰

For the next election, due in 2008, the Basic Law provides only that the method for forming LegCo "shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress," with the ultimate aim of having all members elected by universal suffrage.¹³¹ Procedural provisions in annex II—largely mirroring those governing the selection of the chief executive—add that "if there is a need" to change the method for forming LegCo after 2007, any amendment would have to be supported by two-thirds of LegCo and the chief executive. While changes in the method for selecting the chief executive need NPCSC approval, amendments on the LegCo election method have to be reported to the NPCSC merely for the record.¹³²

2.2. Mainland actors

2.2.1. The central authorities

Accounts of the constitutional structure of the HKSAR generally focus on the institutions of the territory: the chief executive, LegCo, and the judiciary. As

¹²⁶ Deng's Remarks on "One Country, Two Systems" republished, PEOPLE'S DAILY, Feb. 19, 2004.

¹²⁷ Why It's Vital to Recall What Deng Said About HK, PEOPLE'S DAILY, Feb. 20, 2004.

¹²⁸ See *supra* notes 73 and 75.

¹²⁹ The leader of the pro-Beijing Liberal Party in Hong Kong went as far as to state that opposition to the communist party was unpatriotic. See *Liberal Leader Supports Beijing on Democrats*, SOUTH CHINA MORNING POST, March 2, 2004. This is difficult to reconcile with Deng's reassurance that patriots do not have to be "in favor of China's socialist system." Deng, *supra* note 37, at 17.

¹³⁰ Klaudia Lee, *Election Outcome Worries Beijing*, SOUTH CHINA MORNING POST, March 2, 2004; Jimmy Cheung, "One Country" Is Given TV Treatment, SOUTH CHINA MORNING POST, April 5, 2004; Jimmy Cheung, *PLA Sends Patriotic Message with First HK Parade*, SOUTH CHINA MORNING POST, Aug. 2, 2004; Jonathan Powell, *China's Gold Medal Winners to Perform in Hong Kong*, SOUTH CHINA MORNING POST, Sept. 8, 2004; Jimmy Cheung et al., *Democrat "Jailed After Frame-up with Prostitute"*, SOUTH CHINA MORNING POST, Aug. 17, 2004.

¹³¹ Basic Law art. 68(2).

¹³² Basic Law Annex II art. III. See *supra* notes 110 and 111, and accompanying text.

central as these institutions may be to governing Hong Kong, they are not autonomous in the true sense of the word. They may instigate policies, implement, or change them; at some point, however, external approbation from China is required. Thus, chapter II of the Basic Law sets out the “relationship between the Central Authorities and the HKSAR.”

According to the Chinese Constitution, the Central Authorities of the People’s Republic of China consist, inter alia, of the National People’s Congress (NPC), its Standing Committee (NPCSC), the president of the People’s Republic, the State Council or Central People’s Government (CPG), the Central Military Commission, and the People’s Courts.¹³³ Of these, the NPC, the NPCSC, and the CPG are of particular importance with regard to Hong Kong.

The NPC is the “highest organ of state power” with supreme legislative, executive, and judicial authority.¹³⁴ It comprises close to 3,000 deputies and convenes only once a year.¹³⁵ The NPC is vested with the power of amending the Basic Law of the HKSAR.¹³⁶

The CPG, or State Council, is the executive body of the NPC and the supreme organ of state administration. It consists of the premier, vice premiers, state councillors, ministers, the auditor general and the secretary-general.¹³⁷ The CPG appoints the chief executive of the HKSAR and the principal officials of the executive authorities¹³⁸ and is responsible for matters touching upon China’s sovereignty.¹³⁹

The NPCSC is the permanent body of the NPC and holds a wide range of legislative, executive, and judicial powers;¹⁴⁰ in particular, article 67(4) of the Constitution vests the NPCSC with the authority to interpret laws.¹⁴¹ On specific issues, it is the NPCSC that has the final say on most Hong Kong affairs. In some instances, the Hong Kong government reports to the NPCSC

¹³³ XIAN FA ch. III (P.R.C.).

¹³⁴ XIAN FA arts. 57, 62–65.

¹³⁵ XIAN FA art. 61.

¹³⁶ *Basic Law* art. 159(1).

¹³⁷ XIAN FA arts. 85 and 86.

¹³⁸ *Basic Law* arts. 15, 45 and 48(5).

¹³⁹ *Basic Law* arts. 13 (foreign affairs), 14 (defense), 131 and 132 (air service agreements), and 150, 152, 153 and 155 (authorization for matters of external affairs).

¹⁴⁰ It may, inter alia, enact and amend laws (XIAN FA art. 67(2)), grant pardons (art. 67(17)), and decide on mobilization (art. 67(19)).

¹⁴¹ For detailed discussion of the basis and use of this authority see Wen Hongshi, *Interpretation of Law by the Standing Committee of the NPC*, in HONG KONG’S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION 184–192 (Johannes Chan et al. eds., Hong Kong Univ. Press 2000).

merely for the record, as with regard to LegCo election procedures subsequent to 2007.¹⁴² Yet in many cases, NPCSC approval is a precondition for the validity of acts of the HKSAR authorities, and it may influence key aspects of governance such as the declaration of a state of emergency.¹⁴³ In the context of constitutional development, however, it is the NPCSC's power to interpret the Basic Law that has had the most significant repercussions.

As set out above,¹⁴⁴ constitutional development in Hong Kong is linked to a number of conditions. While the Basic Law delineates a fairly comprehensive system of government with a strong executive, a weak legislature, and an independent judiciary, it acknowledges that this system is not final, that its "ultimate aim" is the selection of both the chief executive (upon nomination by a committee) and LegCo by universal suffrage.¹⁴⁵ Yet the Basic Law does not provide a clear path to reach this aim. There is no generally understood "principle of gradual and orderly progress" in constitutional law, nor is the "light of the actual situation in Hong Kong" especially illuminating.¹⁴⁶ The procedural provisions in annex I and II apply only "if there is a need" for change. Yet given that the present system is not based on universal suffrage, and that the Basic Law sets universal suffrage as the ultimate aim, the need for change is already acknowledged, and thus the additional qualifications in annex I and II would seem superfluous. In the end, the Basic Law leaves ample room for interpretation, and, as a result, for considerable influence of the NPCSC.

And the power of interpretation rests exclusively with the NPCSC. Moreover, the NPCSC may interpret the Basic Law at its own initiative.¹⁴⁷ Upon authorization by the NPCSC, Hong Kong courts may interpret on their own—in adjudicating cases—those provisions of the Basic Law that are "within the limits of the autonomy of the Region."¹⁴⁸ However, in all cases that come within the CPG's purview or bear on the relationship between the CPG and the HKSAR, the courts must seek an interpretation of the relevant provisions from the NPCSC before making a final, nonappealable judgment.¹⁴⁹

¹⁴² See *supra* note 132. Another example is *Basic Law* art. 90 (appointment of the Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court).

¹⁴³ *Basic Law* art. 18(4). See also *Basic Law* arts. 17(2) and 160 (validity of laws passed by LegCo or under British rule) and 18(3) (application of mainland laws to the HSAR).

¹⁴⁴ See *supra* notes 111, 131, and accompanying text.

¹⁴⁵ *Basic Law* arts. 45(2) and 68(2).

¹⁴⁶ *Id.*

¹⁴⁷ *Basic Law* art. 158(1).

¹⁴⁸ *Basic Law* art. 158(2).

¹⁴⁹ *Basic Law* art. 158(3) provides: "Only the Court of Final Appeal (CFA) may seek interpretation from the NPCSC. If another court passes a judgment that cannot be appealed, it has to seek NPCSC interpretation through the CFA."

2.2.2. *The Communist Party of China*

Before analyzing how the NPCSC has made use of its powers, it is important to recall some peculiar aspects of Chinese constitutional law: first, there is no separation of powers in the People's Republic.¹⁵⁰ While at first sight, the procedure for NPCSC interpretation of the Basic Law is reminiscent of the preliminary rulings handed down by the European Court of Justice,¹⁵¹ the NPCSC is a political, not a judicial body. Consequently, it has applied a political rather than a legal standard to the Basic Law. Second, the Constitution is but a very vague indication of how decisions are actually taken in the People's Republic, and by whom. Socialist constitutions in general are of a "secondary and functional nature."¹⁵² Contrary to Western constitutions, they do not aim to restrict state power and protect civil liberties but, mostly, exist only to indicate general policies and are but one means among others to further the revolutionary cause. The main agent of that cause remains the Communist Party of China (CPC). A separate legislative body may well be useful "as long as it keeps the right policies and direction"; however, "if the policies are wrong, any kind of legislative body is useless."¹⁵³

The CPC appears only in the preamble to the Chinese Constitution, where the party's leadership on the socialist road is stressed.¹⁵⁴ The constitution of the CPC, on the other hand, states that "the Party commands the overall situation and coordinates the efforts of all quarters." It is the party that has to "see to it that the legislative, judicial and administrative organs of the state" fulfill their responsibilities.¹⁵⁵ This supervision is political in nature and, therefore, is guided by political considerations.¹⁵⁶ The position of the

¹⁵⁰ See Deng's remarks *supra* note 72. On the general characteristics of socialist constitutional theories, see GHAI, *supra* note 13, at 86.

¹⁵¹ Treaty Establishing the European Community, Consolidated Version, Dec. 24, 2002, 2002 O.J. (C 325) 33, art. 234.

¹⁵² GHAI, *supra* note 13, at 86.

¹⁵³ Deng, *supra* note 69, at 75.

¹⁵⁴ The leadership of the CPC is one of the four basic principles that form the "guiding ideology of the Constitution." see Peng, *supra* note 38, at 398–399. The other three are the insistence on the socialist road, democratic dictatorship, and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and (most recently) the important thought of Three Represents (XIAN FA pmbl, para. 7). For discussion, see ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 39 (LexisNexis 2004).

¹⁵⁵ CONSTITUTION OF THE CPC (AS AMENDED AND ADOPTED AT THE 16TH NATIONAL CONGRESS OF CPC ON NOV. 14, 2002), General Program, para. 22, available at <http://english.cpc.people.com.cn/65732/4446148.html> (last visited April 6, 2007).

¹⁵⁶ This is also apparent in the selective approach to fighting corruption. When Chen Liangyu, party chief of Shanghai, was dismissed on charges of mismanagement in September 2006, it was generally seen as an attempt to reduce the influence of former President Jiang Zemin and his so-called "Shanghai gang." See *Shanghaied*, THE ECONOMIST, Sept. 30, 2006, at 77.

party is further strengthened by the principle of democratic centralism, or “democracy under centralized guidance.”¹⁵⁷ This principle allows for subordinate institutions to participate in the formulation of a policy; however, once a decision has been taken at the top level, it is binding. It also requires the subordination of a lower-level organ to a higher-level organ and of a local authority to the central authority.¹⁵⁸ Consequently, when a decision has been taken by the highest party echelons, it may not be questioned by lower organs, whether they are part of the state or the party structure. This also applies to the NPCSC; therefore, its interpretations of law—including the Basic Law of the HKSAR—will have to be in line with decisions and policies previously adopted by the party leadership.¹⁵⁹ Thus, its interpretations are of a political, rather than legal, nature, and it is bound to rely, *inter alia*, on “Deng Xiaoping Theory”¹⁶⁰ and its hostility to elections in Hong Kong.¹⁶¹

3. Interpretation of the Basic Law and constitutional reform

With the return of Hong Kong to China, the Chinese system based on the primacy of the political, on one-party rule, and on democratic centralism has had to accommodate an entity governed by the common law with its emphasis on precedent, due process, an independent judiciary, and judicial review.¹⁶² The Hong Kong Court of Final Appeal (CFA) at first supported the extremely narrow view of autonomy advanced by the HKSAR government, namely, that the Hong Kong courts could not review any act of the People’s Republic, and that the Central Authorities’ competence over Hong Kong was not limited by the Basic Law.¹⁶³

The CFA later reconsidered its stance in a case on the right of abode. It now held that the HKSAR courts had the right, and even the obligation, to review any legislative acts of the NPC or the NPCSC for consistency with the

¹⁵⁷ XIAN FA art. 3; CONSTITUTION OF THE CPC, General Program, para. 21 and art. 10.

¹⁵⁸ For a more detailed account, see GHAI, *supra* note 13, at 99.

¹⁵⁹ The principle of democratic centralism also applies to interpretations by the NPCSC. See Wen, *supra* note 141, at 193.

¹⁶⁰ See *supra* note 154.

¹⁶¹ See *supra* notes 69–75.

¹⁶² On the impact of the common law on Hong Kong, see BERRY F. C. HSU, *THE COMMON LAW IN CHINESE CONTEXT* (Hong Kong Univ. Press 1992). On the number of judicial review cases decided by Hong Kong courts, see Tai, *supra* note 96, at 54.

¹⁶³ Yash Ghai, *Litigating the Basic Law: Jurisdiction, Interpretation and Procedure*, in HONG KONG’S CONSTITUTIONAL DEBATE, *supra* note 141, at 7 and 16. The case under consideration was HKSAR v. Ma Wai Kwan David [1997] H.K.L.R.D 761 (on the legality of the Provisional LegCo).

Basic Law, and to strike them down if necessary.¹⁶⁴ The CFA also claimed that it was for it alone to decide whether, in adjudicating a case, an interpretation had to be sought from the NPCSC under art. 158(3) of the Basic Law.¹⁶⁵ This muscular approach soon led to strong criticism by the Central Authorities, with mainland legal scholars as its vanguard.¹⁶⁶ They claimed that by exercising constitutional jurisdiction, the CFA had tried to assume “the nature of a sovereign power,” extending “its jurisdiction to Beijing.” Such an approach was “ridiculous,” as China was a unitary country; sovereignty, the scholars maintained, was inalienable and could only be exercised by the CPG.¹⁶⁷

The mainland response showed little understanding of the common law system, in general, and of the principle of judicial independence, in particular.¹⁶⁸ Instead, the mainland scholars insisted that the Chinese constitutional approach, as set out above, should apply to Hong Kong as well. The main supporter of this approach in Hong Kong was, somewhat paradoxically, the chief executive of the HKSAR. He decided to seek an interpretation of the Basic Law provision on the right of abode, even though the Basic Law only provides for referral to the NPCSC by way of the CFA.¹⁶⁹ Nevertheless, the chief executive “suggested” an interpretation by the NPCSC.¹⁷⁰ In doing so, he relied on article 158(1) of the Basic Law and article 67(4) of the Chinese Constitution, thus suggesting that the Basic Law has to be interpreted within the framework of the Constitution, or that the Constitution may, in fact, apply directly to the HKSAR.¹⁷¹ With his claim that interpretation could be sought “before, during or after a case,” the chief executive undermined the CFA’s right to final

¹⁶⁴ Ghai, *supra* note 163, at 17. In *Ng Ka Ling v. Director of Immigration* [1999] 1 H.K.L.R.D 315, the CFA considered interpretation of *Basic Law* arts. 22(4) and 24(2)(3). The latter states that persons of Chinese nationality born outside of Hong Kong but to permanent HKSAR residents shall also be entitled to permanent residency. The Hong Kong government relied on an Ordinance passed by the Provisional LegCo to require an exit permit by *mainland* authorities before permanent residency could be granted. The ordinance was found unconstitutional by the court and severed.

¹⁶⁵ Ng Ka Ling at para. 99.

¹⁶⁶ Xiao Weiyun et al., *Why the Court of Final Appeal Was Wrong*, in *HONG KONG’S CONSTITUTIONAL DEBATE*, *supra* note 141, at 53–59.

¹⁶⁷ *Id.*, at 55.

¹⁶⁸ For a rebuttal see Johannes M. M. Chen, *Judicial Independence*, in *HONG KONG’S CONSTITUTIONAL DEBATE*, *supra* note 141, at 61–71.

¹⁶⁹ *Basic Law* art. 158(3), *supra* note 149. The government invoked *Basic Law* arts. 43 and 48(2), which deal with the *implementation* of the Basic Law, not its interpretation.

¹⁷⁰ Yash Ghai, *The NPC Interpretation and Its Consequences*, in *HONG KONG’S CONSTITUTIONAL DEBATE*, *supra* note 141, at 202.

¹⁷¹ Even mainland scholars point out that *Basic Law* art. 158 is an autonomous provision independent of *XIAN FA* art. 67(4), and that the NPCSC should not rely on the Constitution to interpret the Basic Law. See Wen, *supra* note 141, at 193.

adjudication and established the NPCSC as an additional instance. On June 26, 1999, the NPCSC passed an interpretation of the Basic Law that restricted the right of abode and admonished Hong Kong courts to “adhere to this interpretation.”¹⁷²

The chief executive had invoked the NPCSC in pursuance of a specific policy issue, not realizing that he set a precedent for interference in other matters, one which would allow the NPCSC to intervene on its own accord. Indeed, the Standing Committee soon concerned itself with an issue related to the chief executive himself. Tung Chee-hwa had been selected as the first chief executive in 1997.¹⁷³ Because he left office after serving only three years of his second five-year term,¹⁷⁴ it was not clear whether his successor would finish Tung’s term or be elected for a full five-year term.¹⁷⁵ Subsequently, the NPCSC, again at the Hong Kong government’s request, ruled that a new chief executive would serve only the remainder of Tung’s second term.¹⁷⁶ Therefore, new chief executive David Tsang faced reelection in 2007 and thus had to tread very carefully to secure support and reappointment by the CPG.

Another side effect of the 2003 protests, which eventually led to Tung’s resignation, had been the establishment, in early 2004, of a task force on constitutional development.¹⁷⁷ It published its first report in March 2004, examining mainly procedural issues.¹⁷⁸ The report confirmed that, in the view of the Central Authorities, constitutional development was an issue that affected the relationship between the HKSAR and the CPG, and that the latter would,

¹⁷² Interpretation by the NPCSC of arts. 22(4) and 24(2) and (3) of the Basic Law of the HKSAR, June 26, 1999, available at http://www.info.gov.hk/basic_law/fulltext/index.htm. For an account of events see Ghai, *supra* note 170, at 199–215.

¹⁷³ The selection procedure was based on the Decision of the National People’s Congress on the Method for the Formation of the First Government and the First Legislative Council of the HKSAR, April 4, 1990. Cf. *Basic Law* Annex I(6).

¹⁷⁴ See *supra* note 114.

¹⁷⁵ *Basic Law* art. 52(1).

¹⁷⁶ Interpretation by the NPCSC of Paragraph 2, Article 53 of the Basic Law of the HKSAR, Apr. 27, 2005, available at http://www.info.gov.hk/basic_law/fulltext/article1.pdf.

¹⁷⁷ Tung Chee-hwa, *The 2004 Policy Address: Seizing Opportunities for Development – Promoting People-based Government*, para. 77–78, Jan. 7, 2004, available at <http://www.policyaddress.gov.hk/pa04/eng/pdf/speech.pdf>.

¹⁷⁸ CONSTITUTIONAL DEVELOPMENT TASK FORCE (First Report), ISSUES OF LEGISLATIVE PROCESS IN THE BASIC LAW RELATING TO CONSTITUTIONAL DEVELOPMENT (March 2004), available at <http://www.cab.gov.hk/cd/eng/report/index.htm>. For an assessment, see Johannes Chan & Lison Harris, *The Constitutional Journey: The Way Forward*, in HONG KONG’S CONSTITUTIONAL DEBATES, *supra* note 64, at 145–147.

therefore, have a say in it.¹⁷⁹ Yet the report also concluded that article 159 of the Basic Law need not be invoked when changing the selection procedures stipulated in annexes I and II of the Basic Law.¹⁸⁰ Therefore, no NPC approval would be required.¹⁸¹ The task force also set out the competence to initiate amendments to annexes I and II once there was a need for such amendments;¹⁸² however, it did not pronounce on who was to decide whether or when such a need existed.

It was this lacuna that the NPCSC, of its own accord, decided to fill with yet another interpretation based on Basic Law article 158(1) and, again, on article 67(4) of the Chinese Constitution.¹⁸³ First, the NPCSC ruled that, despite the ultimate aim of universal suffrage, there might, in fact, not be any need for amendments in or after 2007.¹⁸⁴ The chief executive was asked to submit a report on the matter, yet the sole authority to decide whether there was a need for amendment or not would lay with the NPCSC, which would take its decision in the light of the actual situation in Hong Kong and with a view to gradual and orderly progress. If, then, such a decision were taken, only the HKSAR executive would be allowed to introduce the relevant motions into LegCo.¹⁸⁵ Thus, the NPCSC has the power to stifle any proposals by simply denying the need for change; if, however, such a need is acknowledged, the HKSAR executive—rather than a more independently minded LegCo—would formulate the relevant proposals. For LegCo, the only way of influencing such proposals would be to block amendments by denying them the required two-thirds majority.

The chief executive duly submitted the requested report on April 15, 2004.¹⁸⁶ In principle, Tung Chee-hwa acknowledged the need for amendment, yet at the same time qualified any amendment to be made. Instead of the two principles stated in the Basic Law—gradual and orderly progress and the actual situation in Hong Kong—the report lists nine factors with which any amendment must

¹⁷⁹ ISSUES OF LEGISLATIVE PROCESS, *supra* note 178, at para. 1.5. See also *supra* note 149 and accompanying text.

¹⁸⁰ ISSUES OF LEGISLATIVE PROCESS, *supra* note 177, at para. 3.8.

¹⁸¹ See *supra* notes 132, 136 and accompanying text. Under Annex II, amendments to the election method of LegCo have to be reported to the NPC for the record only, whereas amendments under art. 159 require NPC approval.

¹⁸² Such need is explicitly required by Annexes I and II. See *supra* notes 111 and 132.

¹⁸³ The Interpretation by the Standing Committee of the NPC of Article 7 of Annex I and Article III of Annex II to the Basic Law, April 6, 2004, available at http://www.info.gov.hk/basic_law/fulltext/0406npcsc_e.pdf.

¹⁸⁴ *Id.* at para. 2.

¹⁸⁵ *Id.* at para. 3.

¹⁸⁶ Tung Chee-hwa, *Report on Whether There Is a Need to Amend the Methods for Selecting the Chief Executive of the HKSAR in 2007 and for Forming the Legislative Council of the HKSAR in 2008*, April 16, 2004, available at <http://www.cab.gov.hk/cd/eng/executive/pdf/cereport.pdf>.

comply.¹⁸⁷ These “factors,” to some extent, state conditions that are to be found neither in the Basic Law nor in its interpretation by the NPCSC. According to the report, the HKSAR, when examining any constitutional change, would, first and foremost, have to “pay heed to the views of the Central Authorities.”¹⁸⁸ Yet while the NPC would certainly have the last—and, after the interpretation of April 6, 2004 (see note 183), also the first—word on amendments, there was no need to grant it a veto during the discussion of amendments as well.¹⁸⁹ The report also claimed that “any proposed amendment must aim at consolidating the executive-led system headed by the Chief Executive”¹⁹⁰—again, there is no basis for such a requirement in the Basic Law. Nor does the Basic Law stipulate that constitutional development is conditional upon “public awareness on political participation, the maturity of political talent and political groups.”¹⁹¹ Thus, while basically acknowledging a need for change, the report added so many conditions that any change would be marginal at best. These conditions advocate the preservation of functional constituencies, favor the executive branch, and display a general suspicion of direct elections.¹⁹²

The interpretation of April 6 and the chief executive’s report had already narrowed the scope for constitutional changes considerably. Yet based on the report, the NPCSC promulgated a decision on April 26, 2004, that effectively barred any substantial changes, ruling that “in the circumstances, conditions do not exist for the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures,” nor for the election of all LegCo members by universal suffrage.¹⁹³

¹⁸⁷ For discussion, see Benny Tai Yiu-ting, *One Principle ... Two Principles... 3, 4, 5, 6, 7, 8, 9 Factors for Constitutional Reform*, in HONG KONG’S CONSTITUTIONAL DEBATES, *supra* note 125, at 15–27. The vice chairman of the Legislative Affairs Commission of the NPCSC had already added the principle of “balanced representation.” See *Explanations on Interpretations of Clause 7 of Annex I and Clause 3 of Annex II to the Basic Law of the HKSAR of the PRC by the NPCSC (Draft)*, PEOPLE’S DAILY, April 2, 2004, available at http://english.people.com.cn/200404/06/eng20040406_139608.shtml.

¹⁸⁸ Tung Chee-hwa, *supra* note 186, at 4 para. (i).

¹⁸⁹ Tai, *supra* note 187, at 20.

¹⁹⁰ Tung Chee-hwa, *supra* note 186, at 4 para. (iv).

¹⁹¹ *Id.*, at 4 para. (vi).

¹⁹² Johannes Chan & Lison Harris, *The Constitutional Journey: The Way Forward*, in HONG KONG’S CONSTITUTIONAL DEBATES, *supra* note 64, at 149. Proponents of indirect elections repeatedly cited the operation of the Electoral College in US presidential elections as a widely accepted example of indirect elections. See The Association of the Bar of the City of New York, “One Person, One Vote”: *The US Electoral System and the Functional Constituencies*, in FUNCTIONAL CONSTITUENCIES, *supra* note 13, at 313. For a discussion (and refutation) of this comparison see FUNCTIONAL CONSTITUENCIES at 314–320.

¹⁹³ Decision of the Standing Committee of the NPC on issues relating to the Methods for selecting the Chief Executive of the HKSAR in the Year 2007 and for forming the Legislative Council of the HKSAR in the Year 2008, April 26, 2004, available at http://www.info.gov.hk/basic_law/fulltext/0426npcsc_e.pdf.

Consequently, neither the chief executive in 2007 nor LegCo in 2008 should be selected by this means. In addition, the proportion of members elected by functional constituencies versus direct elections was also to remain the same.¹⁹⁴ This decision ruled out any significant change in 2007–8. It was not surprising, then, that the subsequent reports of the task force were mainly concerned with justifying the political decision of the NPCSC—legal arguments are notably absent. Instead, the government tried to come up with some suggestions regarding the few issues that had not been precluded by the NPCSC decision, such as the size of the Election Committee and the overall number of LegCo members.¹⁹⁵

Eventually, a fifth report put forward the proposals that were introduced to LegCo on December 21, 2005.¹⁹⁶ First, all district councillors should be included in the Election Committee and the number of its members be increased to 1,600;¹⁹⁷ second, starting in 2008, LegCo would consist of seventy instead of sixty members, yet still with one half selected by functional constituencies and the other half returned by geographical constituencies.¹⁹⁸ These proposals were hailed as substantial and sensible by the government and by pro-China politicians, who maintained that the inclusion of the district councillors in the Election Committee would add a significant democratic element.¹⁹⁹ The democratic camp, on the other hand, denounced the proposals as insufficient and

¹⁹⁴ *Id.* at E9.

¹⁹⁵ CONSTITUTIONAL DEVELOPMENT TASK FORCE (Third Report), AREAS WHICH MAY BE CONSIDERED FOR AMENDMENT IN RESPECT OF THE METHODS FOR SELECTING THE CHIEF EXECUTIVE IN 2007 AND FORMING THE LEGISLATIVE COUNCIL IN 2008 (May 2004), available at <http://www.cab.gov.hk/cd/eng/report3/pdf/thirdreport.pdf>.

¹⁹⁶ CONSTITUTIONAL DEVELOPMENT TASK FORCE (Fifth Report), PACKAGE OF PROPOSALS FOR THE METHODS FOR SELECTING THE CHIEF EXECUTIVE IN 2007 AND FOR FORMING THE LEGISLATIVE COUNCIL IN 2008 (October 2005), available at http://www.cab.gov.hk/cd/eng/report5/pdf/5th_Report_English.pdf

¹⁹⁷ (Draft) Amendment to Annex I to the Basic Law of the HKSAR Regarding the Method for the Selection of the Chief Executive of the HKSAR, *id.*, at Annex B. There are eighteen District Councils with very limited communal powers, comprising 529 councillors, 102 of which are appointed by the government.

¹⁹⁸ (Draft) Amendment to Annex II to the Basic Law of the HKSAR Regarding the Method for the Formation of the Legislative Council of the HKSAR and its Voting Procedures, *id.*, at Annex C.

¹⁹⁹ Press Release, Constitutional Affairs Bureau, Government's Proposed 07/08 Electoral Package Best Way Forward for Democratic Development (Dec. 14, 2005), available at <http://www.cab.gov.hk/cd/eng/media/p121405.htm>; Press Release, Constitutional Affairs Bureau, Government's Proposed Package on 2007/08 Elections Surely Not step Backward in Democratic Development (Dec. 18, 2005), available at <http://www.cab.gov.hk/cd/eng/media/p121805.htm>. However, it has to be kept in mind that appointed district councillors were reintroduced in 1997. See *supra* notes 93 and 197. Also, the Government has ruled out abolishing appointed district councillors before 2012. See Press Release, Constitutional Affairs Bureau, Government's Proposal of Abolishing Appointed District Council Seats in 2012 at the Earliest (Dec. 19, 2005), available at <http://www.cab.gov.hk/cd/eng/media/p121905.htm>

pointed, in particular, to the absence of a timetable for introducing universal suffrage.²⁰⁰ In its final report, the task force had stated that “on the issue of setting a timetable for introducing universal suffrage, the task force notes that there are still divergent views within the community”; therefore, different sectors of the community would have to “continue to work together to help to create favorable conditions for attaining universal suffrage.” Such conditions would include “grooming political talents, and promoting the long-term stability and prosperity of Hong Kong.”²⁰¹ At this stage, implementing the proposals of the task force “would be an important step towards the ultimate aim of universal suffrage.”²⁰² Any further democratization, and particularly the introduction of universal suffrage in 2007–8, would be impossible, seeing that it was barred by the decision of the Standing Committee of the National People’s Congress (NPCSC) of April 26, 2004.²⁰³

During the LegCo meeting held on December 21, 2005, the government made two motions based on the two proposals put forward by the task force.²⁰⁴ Both motions were supported by a majority of thirty-four members, with twenty-four rejecting the proposals and one member abstaining. However, both motions concerned an amendment to the Basic Law and, therefore, required a two-thirds majority of the LegCo.²⁰⁵ Thus, the government suffered an unprecedented defeat, notwithstanding its intensive lobbying efforts during the previous night.²⁰⁶ Meanwhile, the democrats’ tactics, which involved cutting the debate short—thus avoiding further lobbying pressure on individual LegCo members—had led to a rare victory.²⁰⁷ In the aftermath of the decision, Chief Executive Tsang maintained that the proposals had, in fact, gained the support of the majority of Hong Kongers, hinting darkly that “what has happened on the 21st” is bound to affect Hong Kong’s relationship with the CPG, which had

²⁰⁰ Dikky Sinn, *Lawmakers Urge Rethink in Wake of Protest Turnout*, SOUTH CHINA MORNING POST, Dec. 5, 2005; Chris Yeung et al., *We Have Not Offered Timetable, Says Beijing*, SOUTH CHINA MORNING POST, Dec. 8, 2005.

²⁰¹ CONSTITUTIONAL DEVELOPMENT TASK FORCE (Fifth Report), *supra* note 196, at paras. 5(25) and (27).

²⁰² *Id.*, at para. 5(25).

²⁰³ *Id.*, at para. 5(24).

²⁰⁴ LegCo, Minutes of the Meeting Held on Wednesday 21 December 2005 at 11:00 a.m., LC Paper No. CB(3) 253/05–06, at 133–136.

²⁰⁵ *Basic Law* art. 159(2).

²⁰⁶ Dikky Sinn, *No Way I Will Accept, Says Tsang’s Friend Albert Cheng*, SOUTH CHINA MORNING POST, Dec. 22, 2005; Ambrose Leung, *Mandy Tam’s Not a Lady for Turning*, SOUTH CHINA MORNING POST, Dec. 22, 2005.

²⁰⁷ Jimmy Cheung, *Democrats’ Silence Catches the Opposition Off Guard*, SOUTH CHINA MORNING POST, Dec. 22, 2005; Dikky Sinn, *Vigil Becomes a Victory Celebration*, SOUTH CHINA MORNING POST, Dec. 22, 2005.

traditionally been “very accommodating and very selfless in what it has done” for Hong Kong.²⁰⁸ Indeed, the Hong Kong and Macau Affairs Office under China’s State Council stated that the vote had not been “in line with the mainstream” of public opinion in Hong Kong and that the CPG was “unwilling to see” the result.²⁰⁹ An NPCSC member stated that the democratic parties “should be held responsible for halting Hong Kong’s democratic development.”²¹⁰

The vote on December 21 represented the only juncture at which LegCo could have its say on the government proposals; thus, in order not to be sidelined for the foreseeable future, the prodemocracy forces decided to block the motions.²¹¹ Yet this will also mean that, in accordance with the NPCSC’s interpretation of April 6, 2004,²¹² the election of the chief executive in 2007 and of LegCo in 2008 will not entail progress toward the aim of universal suffrage. Instead, the tortuous process of selecting an Election Committee for the chief executive was carried out once more.²¹³ As a feature of this procedure, the 796 members of the committee were entitled to nominate candidates, with each candidate having to secure at least one hundred nominations.²¹⁴ In contrast to the 2005 election, two candidates were standing for the chief executive elections on March 25, 2007.²¹⁵ For the first time, a televised debate between the candidates was held.²¹⁶ But, in the end, the election outcome was predetermined by the CPG, which has to appoint any chief executive—elect²¹⁷—and, as

²⁰⁸ Press Release, *Transcript of the Media Session by the Chief Executive, Mr Donald Tsang, on the First Day of His Duty Visit to Beijing* (Dec. 28, 2005), available at <http://www.info.gov.hk/ce/eng/p200506-12.htm>.

²⁰⁹ *China Criticises HK Lawmakers’ Rejections of Gradual Democratic Reforms*, SOUTH CHINA MORNING POST, Dec. 22, 2005.

²¹⁰ *Hong Kong Democracy Suffers Setback*, PEOPLE’S DAILY, Dec. 23, 2005.

²¹¹ Jimmy Cheung, *Fears of Blank Cheque on Electoral Reform*, SOUTH CHINA MORNING POST, Oct. 18, 2005.

²¹² See *supra* note 183 and accompanying text.

²¹³ For the complicated composition of the Election Committee, see Chief Executive Election Ordinance, (2001) Cap. 569, Schedule Part 2 (H.K.).

²¹⁴ Thus, the Election Committee not only selects the chief executive but also the candidates for the post: Chief Executive Ordinance, (2001) Cap. 569, § 16.

²¹⁵ LegCo Member Alan Leong Kah-kit (Civic Party) secured 132 nominations by members of the Election Committee, compared to 641 for Donald Tsang. See Ambrose Leung & Albert Wong, *Tsang Takes His Place in Race he Cannot Lose*, SOUTH CHINA MORNING POST, Feb. 17, 2007.

²¹⁶ Members of the public were not allowed to attend the debate, which took place before the Election Committee. Yet the supposedly apolitical Hong Kongers watched it in record numbers on television. See *Daap mahn daaih wuis sau sih sing keijap, yu 207 man yahn sau hon [Debate Draws Bigger Audience Than Soap-Operas, Over 2,070,000 viewers]*, MING PAO, Mar. 4, 2007.

²¹⁷ Dicky Sinn, *Pro-Democracy Camp Fields Long-Shot Candidate in Leader Race*, SOUTH CHINA MORNING POST, Nov. 6, 2006.

senior members of the Central Government had already made clear, a chief executive from the opposition was out of question.²¹⁸

The incumbent Donald Tsang was duly reelected by 649 out of 789 votes cast.²¹⁹ In his election manifesto, he had promised to “pragmatically seek to achieve a consensus within [Hong Kong] society on the model for universal suffrage”²²⁰ within his five-year term, and to implement reforms that would allow the political system “to move towards democratization.”²²¹ He did not give any details if, or what, changes to the constitutional arrangement would be considered, or whether he envisaged universal suffrage by 2012 or 2017.²²² Instead, he promised to revive the colonial practice of publishing a green paper on constitutional development and then allowing three months of public consultation. Afterward, he would “frankly report mainstream views and differing opinions to the Central Government,” which would thus be helped “to understand the thoughts and wishes of the Hong Kong people.”²²³ Given their previous experience with such consultations under British rule,²²⁴ it is unlikely that Hong Kongers will be holding their breath.

4. Ultimate aim—or unattainable goal?

According to the Vienna Convention on the Law of Treaties, a treaty should be interpreted in good faith and in accordance with the ordinary meaning given to its terms, in context, and in light of the document’s object and purpose.²²⁵ The Joint Declaration provides for the selection of the chief executive through elections or consultations and for LegCo to be elected as well. It also provides for a “high degree of autonomy.”²²⁶ That the term “elections” carried the generally accepted meaning of democratic elections through universal suffrage and based on the principle “one person—one vote” was confirmed by the Basic Law, which implemented the Declaration that explicitly sets the ultimate aim of universal suffrage. And autonomy, in its true sense, would entail vesting the

²¹⁸ Jimmy Cheung, *No Way Opposition Can Win, State Leader Tells Leong*, SOUTH CHINA MORNING POST, Feb. 7, 2007.

²¹⁹ Alan Leong obtained 123 votes, nine less than for his nomination. Jimmy Cheung, *Tsang wins with 649 votes*, SCMP, Mar. 25, 2007.

²²⁰ DONALD TSANG, ELECTION PLATFORM POLICY BLUEPRINT 19 (Donald Tsang Election Office, Hong Kong 2007).

²²¹ *Id.*, at 20.

²²² Margaret Ng, *You Can Run, But You Can’t Hide From Democracy*, SOUTH CHINA MORNING POST, Feb. 9, 2007.

²²³ TSANG, *supra* note 220, at 20.

²²⁴ *See supra* note 66.

²²⁵ Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 332.

²²⁶ *See supra* note 41 and accompanying text.

power of legislation and interpretation, at least to some extent, in the HKSAR. Under the principle of “one country, two systems,” Hong Kong is not only to enjoy an economic and social system different from the mainland but also a separate constitutional setting.²²⁷ To this end, article 31 of the Chinese Constitution provides for Special Administrative Regions; however, if Hong Kong is to be truly autonomous, this would also require the creation of a “special constitutional zone,” as it were, to be filled exclusively by the Basic Law, at least so far as aspects of the “two systems” are concerned. On the other hand, the HKSAR government and the NPCSC have, in the context of interpretation, repeatedly relied on the Chinese Constitution, thus arguing for its application to the HKSAR.²²⁸ Yet applying the Constitution, which provides, *inter alia*, for unrestricted power of the NPC, would make nonsense of Hong Kong’s autonomy.²²⁹

With the ultimate constitutional aim clearly delineated, the criteria of “gradual and orderly progress” and the “actual situation in Hong Kong” become central.²³⁰ The Basic Law comes with an expiry date, thus setting a time limit for the achievement of universal suffrage: the law is valid for fifty years—until 2047,²³¹ by which time, at the latest, both LegCo and the chief executive must be elected by universal suffrage. So far, progress has been not merely gradual but negligible. Since an electoral element was first introduced to LegCo in 1985, democratic elements have been added in a very cautious manner, frequently taking two steps back after advancing one step—most notably with the Provisional LegCo in 1997.²³² With regard to the “actual situation in Hong Kong,” the NPCSC’s assumption that Hong Kong still lacks the experience necessary to practice democratic elections²³³ can be made indefinitely, as long as democratic elections are not held. It is difficult to see how the NPCSC, as an appointed body in a communist system, should be ideally suited to pronounce on matters of universal suffrage. In addition, the LegCo elections in 2004 saw a vigorous political culture that would do honor to many mature democracies.

Responsibility for the slow progress lies, first and foremost, with the Central Authorities. In 1985, Deng had stated that Hong Kong had to be governed by

²²⁷ In fact, the capitalist economic system would be irreconcilable with the constitutional system as prescribed by the Chinese Constitution.

²²⁸ See *supra* notes 169, 183, and accompanying text.

²²⁹ On the relationship between the Basic Law and the Constitution, see Yash Ghai, *The Imperatives of Autonomy: Contradictions of the Basic Law*, in HONG KONG’S CONSTITUTIONAL DEBATES, *supra* note 64, at 34–35, and GHAI, *supra* note 13, at 178.

²³⁰ See *supra* notes 110 and 131 and accompanying text.

²³¹ Joint Declaration art. 3(12).

²³² See *supra* note 96.

²³³ NPCSC Decision of April 26, 2004, *supra* note 193, at E7.

patriots, and that elections “would not necessarily bring out people like that.”²³⁴ Today’s leaders of China still very much stand by that position, as the reemergence of Deng in 2004 and the restrictive interpretation of Hong Kong autonomy by the NPSCS have shown.²³⁵

Yet the instrument of interpretation was first invoked not by the CPG but by the government of the HKSAR.²³⁶ So far, its executive has shown little inclination to lead the HKSAR to universal suffrage. True, under the current constitutional structure, its allegiances are likely to be to the CPG rather than to a powerless electorate in Hong Kong.²³⁷ Yet its subservience to the Central Authorities has considerably slowed constitutional progress by adding additional conditions for democratization.²³⁸ It is not particularly ambitious for sixty-two-year-old Chief Executive Tsang to state, as he has done, that he hopes to see universal suffrage in Hong Kong in his lifetime.²³⁹ In some respects, Hong Kong might be reminded of its colonial days, for it is saddled with an appointed administration that is neither truly elected by nor responsible to the people of Hong Kong. Moreover, it is an administration that, under the guise of protecting stability and prosperity, is more intent on pursuing the agenda of the metropolitan power than on safeguarding the interests of Hong Kong.

The HKSAR government also matches its colonial predecessor in benign paternalism. It seems to doubt that Hong Kong citizens are able to understand the concept of “one country, two systems,” or that their “public awareness on political participation” is sufficiently high to warrant universal suffrage.²⁴⁰ This skepticism regarding the capability of the governed to have a say in government has a long tradition in modern Chinese political thinking. At the outset of the twentieth century, Dr. Sun Yat-sen had already argued that a government had to impose order during a period of “tutelage.” Once the people had learned enough about self-government, they would be given the freedom in practice to which they were entitled in principle.²⁴¹ Similarly, Deng had argued that “because we have one billion people, and their educational level is

²³⁴ See *supra* note 73.

²³⁵ See *supra* notes 127, 184, and 193.

²³⁶ See *supra* note 170 and accompanying text.

²³⁷ See *supra* note 109. Nominally, the Chief Executive is accountable to both the CPG and LegCo (*Basic Law* art. 43(2)).

²³⁸ See *supra* note 187 and accompanying text.

²³⁹ Press Release, CE Speaks to Media After the Public Rally (1) (Dec. 4, 2005), available at <http://www.info.gov.hk/gia/general/200512/04/P200512040248.htm>.

²⁴⁰ Tung Chee-wah, *supra* note 186, at 5–6.

²⁴¹ Andrew J. Nathan, *Redefinitions of Freedom in China*, in *THE IDEA OF FREEDOM IN ASIA AND AFRICA* 255 (Robert H. Taylor, ed., Stanford Univ. Press 2002); Hsü, *supra* note 7, at 463.

not very high, conditions are not yet ripe for direct elections” in China.²⁴² Donald Tsang followed this tradition in his 2006–7 policy address when he stated that “to prepare for democratic government, Hong Kong needs to encourage quality people to pursue a political career.” To this end, the government would promote national and civic education and would “provide more channels for those who aspire to a political career in the Administration.”²⁴³ Apart from such musings on a period of “tutelage,” constitutional development was largely absent from the chief executive’s policy address. Instead, he chose to impress on Hong Kongers the importance of promoting “social harmony.”²⁴⁴ It so happened that social harmony had also been the focus of the sixth plenary session of the Sixteenth Central Committee of the Chinese Communist Party, which had opened three days before the chief executive delivered his policy address.²⁴⁵ It does, indeed, appear as if Hong Kong has entered a new phase of “convergence.”²⁴⁶

²⁴² Deng, *supra* note 69, at 76.

²⁴³ Donald Tsang, The 2006–07 Policy Address: Proactive, Pragmatic, Always People First (Oct. 11, 2006), available at <http://www.policyaddress.gov.hk/06-07/eng/pdf/speech.pdf>, at para. 12. Generally, political careers are pursued *outside* the administrative sector. Tsang’s comments might reflect both imperial Chinese and British colonial traditions of government through a civil-service caste.

²⁴⁴ Tsang, *supra* note 243, at paras. 35 and 75.

²⁴⁵ Communiqué of the Sixth Plenum of the 16th CPC Central Committee, Oct. 12, 2006, available at <http://english.cpc.people.com.cn/66102/4907960.html>. The Communist Party’s argument for social harmony was partly based on socialism but also on the “essence of traditional Chinese culture.” Geng Zhijun, *Harmonious Culture and Harmonious Society*, PEOPLE’S DAILY, Sept. 1, 2006.

²⁴⁶ On convergence during the transitional period, see *supra* note 57 and accompanying text.